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No. 09-948

In The
Supreme Court of the United States

JUSTIN JONES, Director,
Oklahoma Department of Corrections,

Petitioner,

v.

MICHAEL JOE WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari
To The Tenth Circuit Court Of Appeals

REPLY BRIEF FOR PETITIONER

W.A. DREW EDMONDSON
Attorney General of Oklahoma

JENNIFER B. MILLER, OBA #12074
Assistant Attorney General

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (Fax)
jennifer.miller@oag.ok.gov
Attorneys for Petitioner

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute that (1) this Court has not clearly established whether the Sixth Amendment is violated when a defendant rejects a plea offer because of deficient assistance of counsel but then is convicted at a fair trial; (2) this Court has therefore not clearly established what the appropriate remedy is were there such a violation; and (3) those lower courts that have recognized a Sixth Amendment violation in this situation are divided over the proper remedy. Those undisputed propositions compel the conclusion that the Tenth Circuit failed to comply with AEDPA when it granted habeas relief in this case.

Having found a Sixth Amendment violation, the Oklahoma Court of Criminal Appeals (OCCA) reduced Respondent's sentence from life *without* the possibility of parole to life *with* the possibility of parole. No decision by this Court "clearly establishes" that that remedy is constitutionally inadequate; AEDPA therefore bars habeas relief in this case. The Tenth Circuit's flagrant disregard of the limits Congress imposed through AEDPA warrants this Court's review.

1. Respondent's principal defense of the Tenth Circuit's decision rests on his assertion that the OCCA held it was "constrained" by state law in imposing a remedy, and that this runs afoul of the general rule set forth in *United States v. Morrison*, 449 U.S. 361, 364 (1981), that the remedy for a "Sixth

Amendment deprivation[ ] . . . should be tailored to the injury suffered from the constitutional violation." BIO 9-11. That argument founders on its premise. The OCCA did *not* say that state law dictated the remedy it provided. The court stated only that, "[h]aving considered many possibilities, we find [Respondent's] sentence should be modified to life imprisonment with the possibility of parole." Pet. App. 119.

Respondent quotes the OCCA as having "considered itself '[c]onstrained by a state-law statutory minimum for those convicted of first-degree murder'" (BIO 10, *quoting* Pet. App. 53), but that language is the Tenth Circuit's characterization of the OCCA's ruling. The OCCA itself said no such thing. Even assuming *arguendo* that state law may not "constrain" the remedy for a Sixth Amendment violation, that rule is not implicated in this case. *Cf. Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (AEDPA "demands that state-court decisions be given the benefit of the doubt").

Respondent's reliance on *Morrison* is also misplaced because it operates at far too high a level of generality to "clearly establish" the law applicable to this case. The truism that the remedy "should be tailored to the injury suffered from the constitutional violation" does not resolve the very difficult question posed by this Court in *Arave v. Hoffman*, 552 U.S. 1008 (2007): "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted

and sentenced pursuant to a fair trial?" Indeed, had *Morrison* "clearly established" the answer to that question, the Court would not need to have added that question when it granted certiorari in *Hoffman*.

The State is not contending that AEDPA "require[s] state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." BIO 12, *quoting Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). But as this Court has repeatedly held, the existence of a general rule does not "clearly establish" the law that applies to a category of cases as to which the general rule's application is uncertain. *See, e.g.*, *Carey v. Musladin*, 549 U.S. 70, 72, 76 (2006) (the general rule "that certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial" did not clearly establish the law governing when "private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial").

Respondent concedes that *Morrison* did not establish "*which particular* remedy 'is appropriate in this particular category,'" but insists that "*Morrison* ruled out *the remedy imposed by the state court*." BIO 12, *citing* Pet. 13. Yet precisely because this Court has not yet addressed "*which particular* remedy," if any, applies in the foregone plea context, this Court has not definitively "ruled out" the remedy the OCCA imposed. The question added by this Court in *Hoffman* left open the possibility that no remedy should be provided to a defendant in Respondent's situation. If the Court ultimately adopts that rule, the remedy

granted by the OCCA would be comparatively generous.

The OCCA's remedy also makes eminent sense when one considers the flaws of the remedies other courts have adopted. As the Petition explained, granting a new trial to a defendant who has already been convicted after a concededly fair trial makes no sense. Pet. 17. He has already received the remedy, namely, a fair trial. Conducting a "do over" in no way remedies the lost opportunity to accept the original plea. Nor is enforcing the original plea any more satisfactory. This remedy places the defendant in a better position than he was in originally, and creates serious separation of powers concerns, for it forces the executive branch to offer a plea that it could originally have altered or withdrawn. Pet. 17. Respondent does not explain why either of those flawed remedies is superior to the one adopted by the OCCA, which provides a concrete benefit to Respondent, respects the outcome of the fair trial through which he was convicted, and creates no separation of powers problems.[1]

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[1] Respondent asserts that the State conceded that the remedy awarded by the OCCA contravenes *Morrison* (BIO 10 n.2) and was "inadequate." BIO 19. Not so. The State merely acknowledged that the OCCA's remedy is "imperfect." Pet. 18. As discussed above, so too are the remedies awarded by other courts and advocated by Respondent. *See State v. Grueber*, 165 P.3d 1185, 1190 (Utah 2007) ("Courts cannot recreate the balance of risks and incentives on both sides that existed prior to trial, and the attempts to do so raise their own serious

(Continued on following page)

The issue, of course, is not whether the remedy granted by the OCCA is the optimal one or even a legally permissible one. *See Renico v. Lett*, 559 U.S. ___ (May 3, 2010), slip op. 11 n.3 ("It is not necessary for us to decide whether the Michigan Supreme Court's decision . . . was right or wrong."). The issue is whether the court unreasonably applied "clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. §2254(d)(1). It manifestly did not. In holding to the contrary, the Tenth Circuit ran afoul of this Court's recent admonition that "AEDPA prevents defendants – and federal courts – from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Lett*, slip op. 12. This Court has frequently granted certiorari when federal courts failed to abide by AEDPA's strictures, *see* Pet. 8, 9; certiorari is once again necessary to enforce Congress's will.

2. Respondent next argues that this case is not a proper vehicle for the Court to resolve whether the Sixth Amendment is violated in the foregone-plea context and what the appropriate remedy is if there were such a violation. BIO 13-17. The question presented by the State does not, however, ask the Court to resolve those issues. The State presents only the question whether the Tenth Circuit contravened the limits imposed by AEDPA when it held that the

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constitutional problems.") (Internal citation and quotation marks omitted.)

OCCA unreasonably applied law "clearly established" by this Court governing the appropriate remedy in this case. *See* Pet. i.

Respondent errs in particular when he asserts that the "State . . . present[s] this case as an opportunity for this Court to resolve the questions that were presented, but not decided, in *Arave v. Hoffman*," *supra*. BIO 13. The State discusses the Court's added question presented in *Hoffman* because it vividly demonstrates the absence of any clearly established law to guide lower courts in addressing Sixth Amendment violations in the foregone-plea context. Certiorari should be granted not to definitively answer the question presented in *Hoffman*, but because the absence of clearly established law is why the Tenth Circuit had no authority to grant habeas relief in this case. As shown by the Court's decisions this Term in *Renico v. Lett*, *supra*; *Smith v. Spisak*, 130 S. Ct. 676 (2010); *Berghuis v. Smith*, 130 S. Ct. 1382 (2010), and *Thaler v. Haynes*, 130 S. Ct. 1171 (2010), a federal court of appeal's refusal to comply with AEDPA warrants this Court's review, even where the case does not present the Court with the opportunity to resolve the underlying constitutional issue.

3. Finally, Respondent argues that the Court should deny certiorari because the Tenth Circuit remanded the case to the district court to the determine the appropriate remedy. BIO 17-18. The final outcome of this federal habeas proceeding is, however, certain: habeas relief will be granted because the Tenth Circuit has held that the remedy awarded by the

OCCA unreasonably applied clearly established law. As the Tenth Circuit majority acknowledged (Pet. App. 17) and Judge Gorsuch underscored in his first dissent (Pet. App. 52), the only two remedies available to the district court on remand are specific performance of the plea offer or grant of a new trial. Those two remedies surely were among the "many possibilities" considered by the OCCA and rejected in favor of reducing Respondent's sentence to life with the possibility of parole. Pet. App. 119.

When "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern et al., Supreme Court Practice 281 (9th ed. 2007). This Court has granted review of interlocutory court of appeals decisions innumerable times, *see ibid.* (*citing* cases), and should do so again here. Nothing can happen on remand to resuscitate the OCCA's ruling and to prevent the grant of habeas relief in violation of AEDPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

W.A. DREW EDMONDSON
Attorney General of Oklahoma

JENNIFER B. MILLER, OBA #12074*
Assistant Attorney General

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
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**Counsel of Record*